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Illinois Bell Telephone Company)	
)	
Application for Review of Alternative Regulation Plan)	Docket No. 98-0252
)	
Illinois Bell Telephone Company)	
)	
Petition to Rebalance Illinois Bell Telephone Company's Carrier Access and Network Access Line Rates)	Docket No. 98-0335
)	
Citizens Utility Board, People of the State of Illinois)	Docket No. 00-0764
v.)	
Illinois Bell Telephone Company)	(Consol.)

AMERITECH ILLINOIS' REPLY
TO CUB/AG RESPONSE TO MOTION TO DISMISS

Illinois Bell Telephone Company ("Ameritech Illinois" or "the Company"), by its attorneys, hereby submits its Reply to the CUB/AG Response to Ameritech Illinois' Motion to Dismiss in Docket 00-0764.

Procedural Issues

1. CUB/AG contend that Ameritech Illinois' motion is procedurally defective. (CUB/AG Response pp. 1-2). They cite to the Illinois Code of Civil Procedure and Sunderland

v. Illinois Bell, 254 Ill. App. 3d 983, 988 (1983) (sic)¹ for the proposition that the Commission must accept all facts pleaded as true in deciding whether a complaint may proceed. CUB/AG are incorrect.

2. The Illinois Code of Civil Procedure does not govern administrative proceedings. Desai v. Metropolitan Sanitary Dist. 125 Ill. App. 3rd 1031, 1033 (1st Dist. 1984). The Code of Civil Procedure is applicable only if, and to the extent that, it is expressly incorporated in the procedural rules of the agency itself. 5 ILCS 100/5-75. The Commission's Rules of Practice do not incorporate Sections 2-615 or 2-619 of the Code of Civil Procedure; and, in fact the Commission's rules governing complaints and motion practice do not incorporate any provisions from the Code of Civil Procedure. See 83 Ill. Admin. Code §§ 200.170, 200.190. As an administrative agency, this Commission has the inherent authority to dismiss complaints in its administrative discretion. CUB/AG ignore the cases cited in Ameritech Illinois' Motion to Dismiss on this point. (Ameritech Illinois Motion to Dismiss, pp. 7-8). See Chesterfield-Madora Telephone Co. v. Commerce Commission, 37 Ill. 2d 324, 327-28 (1967); Illini Coach Co. v. Commerce Commission, 408 Ill. 104, 114 (1951).

3. Contrary to CUB/AG's views, the Commission is not just an "umpire" in proceedings conducted under the Public Utilities Act. It has the requisite authority to shape the

¹ Undersigned counsel notes that she was not the plaintiff in the cited case. The case name is Sutherland v. Illinois Bell.

scope and subject matter of dockets. Antioch Milling Co. v. Public Service Co., 4 Ill. 2d 200 (1954). This principle applies with even greater force here, because CUB/AG have asked that their Complaint become an integral part of the Alternative Regulation Plan review proceeding, which the Commission required to be initiated and whose scope the Commission defined in its Order in Dockets 92-0448/93-0239. Thus, the Commission has a compelling interest in ensuring that the review proceeding meets its objectives set out in the 1994 Order.

4. CUB/AG contend that Ameritech Illinois' Motion to Dismiss cannot be taken with the case and resolved at the close of hearings. (CUB/AG Response, p. 2).² Ameritech Illinois agrees that it may be possible to resolve the Complaint on its merits at the close of the proceeding, as CUB/AG suggest. However, it is difficult to make that judgment now. It remains to be seen what legal arguments CUB/AG will make based on the pendency of this Complaint. As Ameritech Illinois explained in its Motion to Dismiss, it is conceivable that CUB/AG will claim that this Complaint requires the Commission to reduce Ameritech Illinois' rates, even if the Commission concludes as a matter of policy under Section 13-506.1 that its rates should not be changed. (Ameritech Illinois Motion to Dismiss, p. 7). Ameritech Illinois finds seriously troubling the fact that CUB/AG did not respond to this central issue at all in their Response.³

² Hearing Examiner Casey raised a similar issue at the status hearing on January 9, 2001, suggesting that Ameritech Illinois' Motion to Dismiss would more properly be viewed as a motion for summary judgment at the conclusion of the proceeding.

³ CUB/AG state that the issues are "similar, if not identical". (CUB/AG Response, p. 7). Ameritech Illinois is unclear what CUB/AG mean by qualifying this statement with the word "similar". Furthermore, they do not explain why this Complaint is necessary to their case, if, in fact, the issues are identical. Ameritech Illinois concludes that CUB/AG are keeping their options open in terms of what use they will make of this Complaint -- which is precisely why Ameritech Illinois is cautioning the Commission to defer ruling on the Motion to Dismiss until the end of the proceeding.

Under these circumstances, the Company urges the Commission to take the Motion to Dismiss with the case to ensure that its decision-making ability is not unduly constrained.

5. The Motion to Dismiss can be taken with the Case, notwithstanding the fact that evidence will be taken in the consolidated proceedings. As counsel for CUB/AG stated at the January 9, 2001, status hearing, consolidation of the Complaint with Dockets 98-0252/98-0335 will not change the scope of the evidentiary record. According to CUB/AG, precisely the same evidence that is being presented in response to the issues in the review proceeding will be used to resolve the complaint case, i.e., no evidence will be submitted uniquely in Docket 00-0764. This means that the Complaint can be maintained in a "virtual" non-evidentiary status until the conclusion until the conclusion of the review proceeding -- even if they are consolidated -- without depriving CUB/AG of their "day in court" or otherwise preventing the "presentation of evidence and the resolution of factual and legal issues". (CUB/AG Response, p. 2). Therefore, the Commission can and should hold the Motion to Dismiss in abeyance; develop a full record in Dockets 98-0252/98-0335; and, then, decide what action to take on the Complaint, if any.

Substantive Issues

6. The remainder of CUB/AG's Response consists of arguments rebutting Ameritech Illinois' view of the law and the facts. As the Company stated in its Motion to Dismiss, these issues should appropriately be resolved based on a complete evidentiary record and briefs. (Ameritech Illinois Motion to Dismiss, p. 8). However, Ameritech Illinois will make a brief response to certain of CUB/AG's contentions.

7. CUB/AG claim that the Commission's statements regarding earnings sharing in the Order in Dockets 92-0448/93-0239 supports an earnings complaint. (CUB/AG Response, p. 3). This is incorrect. The fact that the Commission indicated a willingness to revisit earnings sharing as an alternative to pure price regulation, either in this proceeding or in proceedings involving other carriers, says nothing about whether it intended to reduce Ameritech Illinois' rates to levels that would be consistent with rate-of-return ("ROR") regulation as part of this review. Under a sharing plan, there is no assumption that earnings are at an ROR-based level. In fact, sharing only takes place when the regulated company's earnings exceed benchmarks which are well above what would result from a traditional rate case.

8. Similarly, the fact that the Commission required Ameritech Illinois to report financial information during the term of the Plan in its 1994 Order in no way implies that rates would be reinitialized in this proceeding. (CUB/AG Response, p. 3). In fact, the Commission made clear in the discussion cited by CUB/AG that earnings data would function as an "early warning" that the index was misspecified (i.e., "the total offset in the price regulation formula has been set too low") or that the pricing constraints in the index were "ineffective". (Id.) The issues which the Commission designated for investigation similarly reflected a primary focus on the components of the price index formula. This is not the same thing as reinitializing rates.

9. CUB/AG contend that the Appellate Court "...specifically rejected the notion that adoption of alternative regulation under Section 13-506.1 of the Act would preclude future analysis of an affected carrier's earnings under traditional rate of return principles". (CUB/AG

Response, p. 4.). This is incorrect. As the long quotation provided by CUB/AG makes clear, the Appellate Court concluded only that the Commission could not create an irrebuttable presumption that rates under an alternative regulation plan are “just and reasonable”; as the Court explains, complaints may be brought under Sections 9-250, 10-108 and 13-506.1(e) of the Act. The language of the Court’s opinion, however, begs the question of what standards should be applied in deciding whether Ameritech Illinois’ rates are just and reasonable. The statutory language in Section 13-506.1 clearly distinguishes alternative regulation from ROR regulation and the Appellate Court rejected CUB’s argument in the appeal of the 1994 Order that the Commission must continue earnings-based regulation. Therefore, ROR principles are not and cannot be the relevant or appropriate standards in determining whether the rates of a company under price regulation are “just and reasonable”.

10. CUB/AG take issue with Ameritech Illinois’ characterization of their Complaint. CUB/AG argue that they have not asked the Commission to apply rate-of-return regulation to determine “just and reasonable” rates. (CUB/AG Response, p. 5). CUB/AG contend that they are simply requesting that rates be reduced to just and reasonable levels, “without requesting that the Commission impose rate of return regulation on Illinois Bell”. (*Id.*) This is semantics. CUB is asking the Commission to reinitialize Ameritech Illinois’ rates based ROR principles -- that is ROR regulation, even if the Plan otherwise continues on afterwards.

11. CUB/AG argue that Ameritech Illinois’ competitive service rates should be included in any reductions ordered as a result of their Complaint. (CUB/AG Response, pp. 6-7).

CUB/AG ignore the fact that the Commission's 1994 Order expressly excludes competitive services from the Plan:

"Price regulation directly ensures that noncompetitive rates will remain just and reasonable, while market forces will control competitive service prices and earnings." (Order, p. 187).

This is consistent with how the Commission "regulates" competitive carriers (IXCs and CLECs).

12. In this regard, CUB/AG contend that Ameritech Illinois is engaging in pure speculation by arguing that the Commission would not apply ROR principles to a complaint regarding CLEC prices. (CUB/AG Response, p. 6). In fact, the Commission has never applied ROR regulation to competitive carriers since the mid-1980's, when IXCs obtained competitive toll authority. For example, in the 1987 certificate order for TRI-J Communications, the Commission stated as follows:

"Applicant is a non-dominant telecommunications carrier and, as such, asks that it be exempted from 83 Ill. Adm. Code 250.10, 710 and 735. Concerning Part 710 (Uniform System of Accounts), the Commission notes that the Act indicates that rate base rate of return regulation is suitable only for those telecommunications carriers offering noncompetitive service. Both Part 710 and 735 (Credit, Billing, Deposits and Termination of Service) have been waived for many other telecommunications carriers including Allan. Similar waivers are also appropriate for TRI-J." Order in Docket 86-0373, adopted February 4, 1987, 1987 Ill. PUC LEXIS 34.

Identical waivers have been granted to CLECs under the same legal theory. See e.g., Order in Docket 93-0409 (MFS Intelenet of Illinois, Inc.), adopted July 20, 1994, 1994 Ill. PUC LEXIS

288; Order in Docket 95-0269 (LCI International Telecom Corp.), adopted January 10, 1996, 1996 Ill. PUC LEXIS 12; Order in Docket 95-0429 (Cable and Wireless, Inc.), adopted February 22, 1996, 1996 Ill. PUC LEXIS 84.

13. CUB/AG contend that certain business services may be reclassified as noncompetitive as a result of Docket 98-0860, thereby justifying inclusion of competitive services in their earnings analysis. (CUB/AG Response, p. 7). First, it is pure speculation at this juncture as to the likely outcome of Docket 98-0860. If there is an adverse decision from Ameritech Illinois' perspective, any impact on this proceeding will have to be addressed at that time.⁴ Second, the universe of Ameritech Illinois' services which has been declared competitive is substantially larger than the services at issue in Docket 98-0860. Therefore, even if Docket 98-0860 did return some business services to the noncompetitive category, CUB/AG's estimates of Ameritech Illinois' intrastate earnings in this proceeding would continue to include significant revenues (and costs) associated with services still classified as competitive and would not establish noncompetitive service earnings -- if earnings were even relevant under a price regulation plan, which they are not.

14. In conclusion, CUB/AG's arguments in response to Ameritech Illinois' Motion to Dismiss all go to the core legal and policy issues in Dockets 98-0252/98-0335. Given the unique

⁴ For example, if the Commission were to reclassify services as noncompetitive and order rate reductions pursuant to Section 13-502(d), intrastate financial results presented in this proceeding would have to be adjusted accordingly to reflect lower revenues and lower earnings.

substantive and procedural posture of the CUB/AG Complaint -- i.e., that precisely the same evidentiary record will be used to resolve the issues in the Complaint and the review proceeding -- the Commission can and should hold its decision on Ameritech Illinois' Motion to Dismiss in abeyance until the conclusion of the proceeding to ensure that it can resolve the review proceeding issues in the manner it concludes is appropriate, based on the entire record.

WHEREFORE, in view of the foregoing, Ameritech Illinois' Motion to Dismiss should be taken with the case and resolved at the conclusion of the consolidated proceedings.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, hereby certify that copies of the foregoing Reply to CUB/AG Response to Motion to Dismiss were served upon Staff and the Hearing Examiners by e-mail and all parties by Federal Express on January 17, 2001, from Chicago, Illinois.

A handwritten signature in black ink, appearing to read "Louise A. Sunderland", written over a horizontal line.

Louise A. Sunderland

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